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No. 80-60

# IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

ELVINA M. HERWEG, by her husband and next friend, Darrell E. Herweg; and DARRELL E. HERWEG, on behalf of themselves and all others similarly situated,

Petitioners,

vs.

ROBERT D. RAY, individually and in his capacity as Governor of the State of Iowa; and KEVIN J. BURNS, individually and in his capacity as Commissioner of the Iowa Department of Social Services,

Respondents.

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ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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## JOINT APPENDIX

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RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

Civ. 77-222-1, Herweg v. Ray

| Date | NR. | PROCEEDINGS |
|---|---|---|
| 7-28-77 | 1 | Complaint. |
| 7-28-77 | 2 | Pltfs' Motion for Temp. Rstrg. Order. |
| 7-28-77 | 3 | Pltfs' Motion for Class Action. |
| 7-28-77 | 5 | Acceptance of Service of summon, cplt. motion for TRO and motion for Class Action by Stephen C. Robinson, Special Asst. Atty. General State of Iowa. |
| 7-28-77 | 6 | Temporary Restraining Order; Pending further hearing & determination by this Court, defts. agents & employees and all other persons in active concert and participation with them are restrained from terminating |

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|---|---|---|
| | | Title XIX intermediate care medical assistance benefit payments. Stuart, J., Effective 11:45 am 7-28-77. (copies to attys.) |
| 8-16-77 | 8 | Pltf's Interrogatories to Defts. |
| 8-17-77 | 9 | Pltfs' Memorandum in Support of Certification as a Class Action. |
| 9-15-77 | 11 | Pltfs' Amended Complaint. |
| 9-30-77 | 12 | Defts' Response to Interrogatories. (Exhibits submitted with this pleading are in separate envelope in Court file folder.) |
| 10-7-77 | 14 | Stipulation as to undisputed facts. |
| 10-2077 | 15 | Pltfs' Memorandum in Support of their Request for Final Relief for Themselves and the Class Which They Represent. |
| 10-21-77 | 16 | Defs' Brief in Resis. to Preliminary Injunction. |

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|---|---|---|
| 10-25-77 | 17 | Affidavit of Darrell E. Herweg, Ptnr. |
| 11-3-77 | 20 | Pltfs' Supplemental Memorandum Clarifying Citations in Original Memorandum. |
| 11-15-77 | 21 | Defts' Reply Brief (copy to Judge) |
| 11-28-77 | 22 | Pltf's Response. |
| | | Memorandum Opinion and Order. |
| 1-19-78 | 23 | Pltfs' Request for class action certification granted. pltfs' request for final determination which Court elects to treat as motion for summary judgment granted; further ordered pltfs' request for permanent injct. against state deeming procedures is granted; further ordered that any other matters not disposed of in this opinion & Order will be considered upon application of party or parties; Pltfs. shall |

prepare a Judgment Entry in accordance herewith, obtain defts. approval as to form & submit it to this Court for signature. Costs of this action are assessed against defts. Stuart, J. (59 OJ 44).

2--2-78 24 Judgment in Accordance with the Memorandum Opinion and Order of Jan. 19, 1978; Entered: Ordered and adjudged that pltfs' request for class action certification granted; further ordered and adjudged that pltfs' request for final determination has been treated by Court as motion for Summary Judgment and is granted; further ordered and adjudged that pltfs' request for permanent injunction against state "deeming" procedures granted; further

ordered and adjudged that any other matters not disposed of in the Opinion and Order will be considered on application of a party or parties; further ordered and adjudged that costs of this action are assessed against defts. as of costs accrued of this date. Rosenbaum, Clk. (copies to attys.) (59 OJ 93)

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| 3-17-78 | 26 | Pltfs' Motion for Relief Consistent with Court's Order of 1-19. |
| 3-17-78 | 27 | Pltfs' Memorandum in Support of Motion for Relief Consistent with Court's Order of 1-19. |
| 3-22-78 | 28 | Deft's Motion for Relief Consistent with Court's Order of 1-19-78; |
| 3-22-78 | 29 | Deft's Memorandum Brief in Support of Motion for Relief. (copy to Judge.) |

| | | |
|---|---|---|
| 3-31-78 | 30 | Pltfs' Response to Defts' Concurrent Motion for Relief Consistent with Court's Previous Order. |
| 4-27-78 | 32 | Clerk's court Minutes Re: Oral hearing on motion for relief consistant with Court's Order; oral arguments by counsel. Matter submitted, Stuart, J. |
| 5-10-78 | 33 | Pltfs' Supplementary Brief in Support of their motion for Relief Consistent with Court's Previous Order. (copy to Judge). |
| 6-27-78 | 34 | Defts' Reply Brief (copy to Judge) |
| 7-10-78 | 35 | Order; Ordered proposed manual letter submitted by defts. at hrg. is specifically approved except it must specifically point out Soc. Sec. benefits, Railroad Retirement Board annuities and Civ. Serv. Com. annuities are to be |

disregard; further ordered that Order of Court dated 1-19-78 is declared to be retroactive to 7-28-77; further ordered parties have 10 days fr. date of Order to submit objections if any to class notice attached to this Order. If no objections filed, notice shall be sent to all members of class as expeditiously as possible. Stuart, J. (copies to attys.)

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| 8-4-78 | 37 | Final Order; Ordered and adjudged that pltfs. have summary judgment in accordance with previous orders and judgment and further ordered that Class Notice attached as Ex. A to Ruling & Order of 7-10-78 shall be sent to all members of class as expeditiously as possible. Court will retain jurisdiction of case for an indefinite period to |

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| | | ensure that there is compliance with these rulings. Stuart, J. (copies to attys.) (61 OJ 151) |
| 8-4-78 | 38 | Judgment: Ordered Class action certification granted, Pltfs. motion for summary judgment granted; pltfs' request for permanent Inct. against state "deeming" procedures granted; Class notice to be mailed to members of class as soon as possible. Rosenbaum, Clk. (copies to attys.) (61 OJ 152) |
| 8-7-78 | 39 | Pltfs' Motion for Award of Attys' Fees. |
| 8-7-78 | 40 | Pltfs' Memorandum of Points & Authorities in support of Pltfs' Motion for Attys' Fees. |
| 8-7-78 | 41 | Pltfs' Affidavit of Gill DeFord. (re: motion for atty. fees) |

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| 8-8-78 | 42 | Notice of Appeal by pltfs. |
| 8-10-78 | 43 | Certificate of Service of Notice of Appeal by pltfs. |
| 8-15-78 | 44 | Affidavit of Robert L. Bray. (re: Motion for Attorneys Fees) |
| 8-17-78 | 45 | Defs' Combined Motion for Continuance and Response to Motion for Award of Atty's Fees. |
| 9-11-78 | 46 | Pltfs' Reply to Defts' Opposition to Pltfs' Motion for Atty's Fees. |
| 10-27-78 | 47 | Order; Pltfs' Mtn. for atty's fees denied for lack of jurisdiction of subject matter. Stuart, J. (copies to attys.) |
| 5--5-80 | 48 | Attsd. copy of OPINION fr. 8th CCA. |
| 5-5-80 | 49 | Attsd. copy of JUDGMENT MANDATE fr. 8th CCA; Ordered and adjudged judgment of district court affirmed except that portion relating to the sources of income |

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| | | the state may consider as available to Medicaid applicants and recipients which is reversed and remanded. /s/ A true Copy, Robert D. St. Vrain, Clk. 8th CCA; copies to attys. c. to Judge. |
| 1-30-81 | 50 | ORDER: Parties directed to report to Court in 10 days as to Status of this action & why it should not be closed. Stuart, J. (copies to attys.) |
| 2-6-81 | 51 | STATUS REPORT by Pltfs. |
| 2-9-81 | 52 | Status Report by Defts. |
| 5-7-81 | 53 | First Updated Status Report. |

GENERAL DOCKET

UNITED STATES COURT OF APPEALS
FOR THE
EIGHTH CIRCUIT

Case No. 78-1664

| DATE 1978 | Filings-Proceedings | Filed |
|---|---|---|
| Aug. 21 | Cert. copies Notice of Appeal, Docket Entries of D. Ct. (1) | |
| " " | Request for docketing fee. (2) | |
| Sept 14 | Docketed case | |
| " " | Appearance for appellants (3) | |
| " | Appearance for appellee (4) | |
| " | Appearance for appellee (5) | |
| Oct 19 | Appendix 0+5 w/ser (6) | |
| " " | Brief Appellant w/ser. 10 copies (7) | |
| Nov 15 | Brief Appellee w/ser. 10 copies (8) | |
| Nov 29 | Reply Brief w/ser 10 copies (9) | |
| DEC 18 1978 | Transferred to January session. | |
| Dec 18 | Received letter from counsel for appellant with attachment. To Court. | |

1979

Jan 12 Argued and submitted to Judge Ross, McMillian, Van Sickle. Gill Deford for appellant; Stephen Robinson, Asst. Atty Gen. for appellee. Rebuttal by Mr. Deford. Recorded

May 4 Motion appellant for lv to file supplementary brief. (10)

May 4 Received supplementary brief appellant.

May 7 ORDER: Motion of appellants for leave to file supplementary brief is granted; supplemental brief is filed; appellees may have ten days from date of this order to file an appropriate response (11)

May 7 Supplementary Brief Appellants 0/4 (w/service) (12)

May 21 Supp. brief Appellee w/ser. 10 copies (13)

June 27 Mo appellants for lv to file second supplementary brief. (14)

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| June 27 | Received appellants second supplementary brief. |
| July 3 | ORDER: Appellants' motion to file second supplementary brief is denied. (15) |
| Aug. 10 | ORDER: Present submission of appeal to a panel of Judges on 1/12/79 is vacated & set aside. Court concludes to re-submit this case to Court en banc. Clerk of this Court directed to calendar case for oral argument and submission to Court en banc on Monday, September 10, 1979. (16) |
| Aug 10 1979 | Transferred to September session. |
| Aug 20 | Mo appellants for order setting Aug. 31, 1979, as date for filing HEW amicus brief. (17) |
| Aug. 23 | ORDER: Motion of appellants for an order setting 8/31/79 as date on or before which Dept. of HEW may submit a brief amicus curiae is granted; |

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| | therefore, brief amicus curiae of the Department of Health Education & Welfare is due to be served and filed on or before 8/31/79 (18) |
| Sept. 4 | Received letter from counsel for appellants with attachment (order of dist. ct. in Utah) -- to court en banc. |
| Sep 10 | Brief Amicus Curiae w/ser. 15 copies (19) |
| Sept 10 | Argued and submitted to the Court En Banc; Judges Gibson, Lay, Heaney, Bright, Ross, Stephenson, Henley, McMillian. Gill Deford for appellants; Stephen C. Robinson, Asst. Atty Gen. for appellee. Rebuttal by Mr. Deford. Recorded |
| Sep 20 | Brief in Response to Amicus w/ser. 11 copies (20) |
| Sep 26 | ORIGINAL FILE OF DISTRICT COURT (2 vol) and Env. EXHIBITS |

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| Oct. 10 | Letter from Asst. Attorney General in resp. to request at oral arg. |
| Nov. 28 | Motion appellants for leave to file supplemental brief. (21) |
| Dec. 4 | ORDER: Appellants' motion for leave to file supplemental brief is granted. Clerk directed to file tendered supplemental brief. (22) |
| Dec. 4 | Appellants' Supplemental Brief. (23) |
| 1980 Jan. 14 | Letter (Deford) and Mo. Ct. Appeals opinion --fwd to ct. |
| Feb. 6 | Received from appellant opinions in Norman v. St. Clair and Brown v. Stanton, forwarded to Court en banc. |
| Mar. 18 | OPINION by Judge Ross, Concurred in by Gibson, Bright & Henley. and OPINION by Judge McMillian, Concurred in by Lay, Heaney & Stephenson. (Published) (24) |

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| Mar. 18 | JUDGMENT: Judgment of District Court is affirmed except that portion relating to the sources of income the State may consider as available to Medicaid applicants and recipients which is reversed and remanded. (25) |
| Mar. 31 | PETITION of appellants for rehearing. (w/service) (26) (NOTE: SENT TO COURT EN BANC BECAUSE SUBMISSION OF 9/10/79 WAS EN BANC AS WAS OPINION OF 3/18/80) |
| Apr. 18 | MOTION of appellants for recusal. (27) |
| Apr. 18 | ORDER DENYING MOTION TO RECUSE: Motion is denied. (Unpublished) (28) |
| Apr. 22 | RECEIVED letter from counsel for appellants, with attachments. -- to court en banc. |
| Apr. 22 | ORDER: Petition for rehearing is denied. (Unpublished) (29) |

May 2 MANDATE issued.

May 7 RECEIPT for mandate. (30)

July 17 NOTICE OF filing petition for writ of certiorari in the Supreme Court of the United States as Case No. 80-60 (as of 7/10/80). (31)

1981

July 6 ORDER of Supreme Court granting certiorari in #80-60, dated 7-2-81 (32)

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF IOWA

| | |
|---|---|
| ELVINA M. HERWEG, by her husband and next friend, Darrell E. Herweg; and DARRELL E. HERWEG, on behalf of themselves and all others similarly situated,<br><br>Plaintiffs,<br><br>vs.<br><br>ROBERT D. RAY, individually and in his capacity as Governor of the State of Iowa and KEVIN J. BURNS, individually and in his capacity as Commissioner of the Iowa Department of Social Services,<br><br>Defendants. | NO. 77-222-1<br><br>AMENDED COMPLAINT |

1. This is a class action for declaratory and injunctive relief pursuant to 42 U.S.C. §1983, 28 U.S.C. §2201 and §2202 which arises under the Constitution and the laws of the United States. Plaintiffs, individually and on behalf of all other persons similarly situated, seek to have this court declare invalid and enjoin the enforcement of Iowa

Department of Social Services (hereinafter, the "Department") policies and practices found in Social Services Manual (hereinafter, the "Manual"), Letter No. X11-1-28 (Part Two) dated June 3, 1977 (attached hereto as Exhibit "A") and authorized by House File 464 §18 Acts of the 67th General Assembly (attached hereto as Exhibit "B") through which a portion of the income of a noninstitutionalized spouse is deemed available to meet the needs of an institutionalized spouse who receives Medicaid benefits without regard to whether the noninstitutionalized spouse is capable of providing the deemed amount to the institutionalized spouse, or whether the deemed amount is actually available to the institutionalized spouse. The statute, regulations, policies and practices are challenged on the grounds that they are in conflict with the Supremacy Clause of the United States Constitution, the Fourteenth Amendment to the United States Constitution, the Social Security Act, 42 U.S.C. §1396 et. seq.,

federal regulations promulgated thereunder and 42 U.S.C. §1983.

JURISDICTION

2. Jurisdiction is conferred upon this court by 28 U.S.C. §1343(3) and §1343(4) which provide for the original jurisdiction of this court over all suits authorized by 42 U.S.C. §1983 to redress the deprivation under color of state law of any right, privilege or immunity secured by the Constitution of the United States or by an Act of Congress providing for equal rights or civil rights of all persons within the jurisdiction of the United States. Substantial questions of Federal Constitutional and statutory law are involved. Jurisdiction is also conferred by 28 U.S.C. §1331; more than $10,000 is at stake in this controversy.

3. Plaintiffs' action for declaratory and injunctive relief is authorized by 42 U.S.C. §1983, and by 28 U.S.C. §§2201, 2202 and Federal Rule of Civil Procedure 57.

## PARTIES

4. Plaintiff Elvina M. Herweg is an adult resident of Iowa who is totally and permamently disabled and currently in a comatose condition. She brings this action by her husband and next friend Darrell E. Herweg. Plaintiff Darrell E. Herweg is a resident of Council Bluffs, Iowa.

5. Defendant Robert D. Ray is sued individually and in his official capacity as Governor of the State of Iowa. In his official capacity the defendant is the chief executive officer of the state and is charged to see that the laws of the state are executed.

6. Defedant Kevin J. Burns is sued individually and in his official capacity as Commissioner of the Iowa Department of Social Services. In his official capacity the defendant is the chief executive officer of the Department and is vested with general supervisory power and

control of Department personnel and policies concerning the operation of Title XIX of the Social Security Act, the Medical Assistance Program.

## CLASS ACTION

7. Plaintiffs bring this action on their own behalf and pursuant to Rule 23(a) and (b)(2), Federal Rules of Civil Procedure, on behalf of all others similarly situated. The class which the plaintiffs represent consists of all married couples residing in Iowa of which: (a) one spouse is eligible for Medicaid and requires institutionalization; (b) the other spouse is not institutionalized; and (c) the noninstitutionalized spouse has income which is deemed available to the institutionalized spouse. The class is so numerous that joinder of all members is impracticable. There are common questions of law and fact. Plaintiffs' claims are typical of the claims of all class members, and plaintiffs will fairly and adequately protect the interests of

the class. Defendants have acted and continue to act on grounds generally applicable to all class members, thereby making declaratory and injunctive relief appropriate with respect to the class as a whole.

## STATUTORY AND REGULATORY FRAMEWORK

8. The Medical Assistance Program (commonly known as "Medicaid"), is a cooperative federal-state program established pursuant to Title XIX of the Social Security Act, 42 U.S.C. §1396 et. seq. In accordance with the Act, the Secretary of Health, Education and Welfare promulgates regulations, 45 C.F.R. §248 et. seq., which, in addition to the statutes, provide the framework in which the states must develop and operate their Medicaid programs.

9. Iowa has chosen to participate in the Medicaid program, and as an element of that participation, Iowa provides Medicaid to individuals

meeting the eligibility conditions, which include an income of no more than $503 per month.

10. For those married individuals who apply for Medicaid assistance to help defray the cost of institutionalized care, Iowa employs a complicated computation to determine what portion of the income of a noninstitutionalized spouse will be considered available to the institutionalized spouse. This calculation is made without regard to the actual needs of the noninstitutionalized spouse or other members of the family, but is instead reached using an arbitrary formula.

11. By employing this arbitrary methodology, defendants place noninstitutionalized spouses in a difficult position of either paying the deemed amount, a financial burden which is often impossible to bear, or of not paying the required amount with the eventual result that the institutionalized spouse will be evicted from the nursing home.

12. The defendants caused to be filed with the Department of Health, Education and Welfare a state plan for the conduct of the Title XIX Medical Assistance Program which failed to comply with federal standards as set forth at 45 C.F.R. §248.3(b), 42 Fed. Reg. 2686 (January 13, 1977). When the regional commissioner of the Social and Rehabilitation Service of the Department of Health, Education and Welfare asked for amendments to the State Plan, defendant Kevin Burns replied by letter dated June 15, 1977 that the state would not amend the plan in compliance with the regulations. (A copy of that letter is attached hereto as Exhibit "C.")

STATEMENT OF CLAIM

13. Plaintiff Elvina M. Herweg was born on December 21, 1930 and is now forty-six years old. Elvina and Darrell Herweg were married July 30, 1949.

14. In August, 1976, Elvina collapsed in the front yard of her home and was rushed to Mercy hospital by a young neighbor. At Mercy, it was discovered that she had suffered an aneurism and cerebral hemorrhage on the left side. An operation was performed to repair the damage to the left side. Within twenty-four hours, plaintiff suffered another aneurism and hemorrhage on the right side which was also surgically treated. Plaintiff has been in a comatose state since she first became unconscious.

15. Plaintiff Darrell Herweg was instructed by the hospital social worker to apply for medical assistance for his wife's hospital care on October 7, 1976, and assistance was granted. Plaintiff Elvina Herweg was determined to be permanently and totally disabled.

16. On January 20, 1977, Mr. Herweg applied for assistance for an extended care facility. The plaintiff, Elvina Herweg, had been placed on

November 1, 1976, in a skilled long-term facility, the Americana Home in Des Moines.

17. Mr. Herweg has contributed to his wife's care while she has been in the nursing facility. Mr. Herweg currently is employed as a butcher in Hinky-Dinky stores and has a gross income of $1,350.00 a month, with a net of $1032.00. Mr. Herweg presently has three teenage daughters living at home.

18. Based on Department computation, Mr. Herweg contributed $234.80 to the nursing home for his wife's care in April, May and June. Mr. Herweg's current expenses exceed his monthly income.

19. The cost of Mrs. Herweg's care is approximately $1,374.00 per month, excluding drug and doctor bills.

20. On June 2, 1977, the Department issued a Notice of Decision (attached hereto as Exhibit "D") cancelling medical assistance for Elvina Herweg effective June 30, 1977, because

Mr. Herweg's income was deemed available to Elvina Herweg.

21. On June 7, 1977, plaintiff Darrell Herweg appealed the decision to cancel assistance (attached hereto as Exhibit "E").

22. On July 15, 1977, the Department held a hearing for the prupose of considering the appeal.

23. On July 21, 1977, the Department issued a decision (attached hereto as Exhibit "F") affirming the earlier decision.

24. On August 11, 1977, a new "Proposed Decision" was issued in which a different computation formula was used. (A copy of that decision is attached hereto as Exhibit "G.") Although that decision permits eligibility for Medicaid, an arbitrary portion of the income of plaintiff Darrell Herweg is still deemed available to plaintiff Elvina Herweg.

25. There is harm to plaintiff Elvina Herweg in that she will be unable to continue to receive necessary nursing home care if her husband is unable to pay the deemed amount. Her husband is similarly injured by the requirement that he pay an arbitrary portion of his income to the nursing home.

26. The harm which plaintiffs are suffering and will continue to suffer if defendants are not restrained from their illegal and unconstitutional acts are not susceptible of redress by a mere award of money damages. Only immediate injunctive relief can insure the continuation of needed medical services to plaintiff Elvina Herweg, and the ability of plaintiff, Darrell Herweg, to meet the basis living expenses for himself and his three children.

FIRST CLAIM FOR RELIEF

27. The "deeming" practices and procedures employed by defendants pursuant to the

Manual and House File 464 §18, 67th General Assembly, violate the applicable implementing regulations, 45 C.F.R. §248.3(b), which require that the state not deem income available from a noninstitutionalized spouse to an institutionalized spouse after the end of the calendar month in which the institutionalized spouse first enters the institution.

SECOND CLAIM FOR RELIEF

28. The "deeming" practices and procedures employed by defendants pursuant to the Manual and House File 464 §18, 67th General Assembly, violate the Medicaid statute, 42 U.S.C. §1396a(a)(17), which requires that: (1) the state have reasonable standards for determining eligibility for Medicaid assistance; (2) that it provide that only income and resources actually available to the recipient of Medicaid benefits be considered; (3) that income and resources be reasonably evaluated; and (4) the state take into account, for

the purposes of determining an appropriate payment from the noninstitutionalized spouse, the income and resources of only those relatives who are legally responsible.

THIRD CLAIM FOR RELIEF

29. The practices and procedures of defendants create an irrebuttable presumption that the noninstitutionalized spouse is capable of paying the amount computed by the formula set forth in the Manual and that the deemed amount is actually available for the care of the institutionalized spouse. These irrebuttable presumptions, which are not rationally related to a legitimate state interest, violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

FOURTH CLAIM FOR RELIEF

30. By imposing an additional eligibility condition on otherwise eligible Medicaid recipients,

defendants create two classes of Medicaid recipients. One consists of unmarried institutionalized Medicaid recipients, and the other consists of married institutionalized Medicaid recipients. The discriminatory treatment of the class of married institutionalized Medicaid recipients, whose continued receipt of necessary health care is dependent upon the payment of an arbitrary amount by their noninstitutionalized spouse, is irrational and capricious and therefore violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

## REQUEST FOR RELIEF

Wherefore, plaintiffs respectfully request on behalf of themselves, and all other persons similarly situated, that this Court:

1. Assume jurisdiction over this case.

2. Determine by order, pursuant to Rule 23(c)(1), that this action be maintained as a Rule 23(b)(2) class action.

3. Enter preliminary and permanent injunctions pursuant to Rule 65 of the Federal Rules of Civil Procedure enjoining defendants, their successors in office, agents and employees and a all other persons in active concert and participation with them, from enforcing the state practices and procedures which require that an arbitrary portion of the income of a noninstitutionalized spouse of an institutionalized recipient of Medicaid is deemed available for the care of the institutionalized spouse without regard to the actual living costs of the noninstitutionalized spouse.

4. Declare that defendants' enforcement of the "deeming" formula violates the applicable implementing regulations of the Medicaid statute, 45 C.F.R. §248.3(b).

5. Declare that defendants' enforcement of the "deeming" formula violates the applicable portion of the Medicaid statute, 42 U.S.C.

§1396a(a)(17).

6. Declare that defendants' enforcement of the "deeming" formula amounts to an irrebuttable presumption in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

7. Declare that defendants' enforcement of the "deeming" formula creates an arbitrary classification in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

8. Award plaintiffs their costs incurred herein, including reasonable attorneys' fees.

9. Grant such other and further relief as to the court seems just and proper.

Respectfully submitted,

GILL DEFORD
NEAL DUDOVITZ
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Des Moines, Iowa 50309
Telephone: (515) 273-2151

By /s/
Robert L. Bray

Attorneys for Plaintiffs

EXHIBIT A

STATE OF IOWA
Department of Social Services
Des Moines

June 3, 1977

SOCIAL SERVICES MANUAL LETTER
NO. XII-1-28 (Part Two)

SUBJECT: TITLE XIX MEDICAL ASSISTANCE - Title XIX Medical Institution: Eligibility Standard, Social Security Increase and Revision of Client Participation

1. Title XIX Medical Assistance - Financial Eligibility

A. Financial Eligibility Standard

After the July 1976 Social Security/Supplemental Security Income Increase the Department's Administrative Rules were changed in regard to the income limitation for eligibility in a Title XIX medical institution. The Title XIX medical institution income limitation for eligibility was frozen at $503 per month or the cost of care in the facility whichever is the lesser amount. This income limitation will remain at

$503 whether or not there is an increase in the SSI payment amount. The SSI cost of living increase effective 7-1-77 is the first time the frozen figure has affected eligibility.

B. Correction in Eligibility Income Computation

We have been advised by the Department of Health, Education and Welfare that the method we are currently following in computing monthly income for purposes of comparison with the $503 income limitation is wrong. The incorrect policy is outlined in Employees' Manual, XII-1-12 (Part Two), Determination of Income for Eligibility Purposes and Social Services Manual Letter XII-4-7 dated October 15, 1974.

To correctly compute Title XIX medical institution financial eligibility the $25 personal allowance shall not be disregarded or excluded prior to comparing the gross income figures or cost of care figure of

the individual for eligibility purposes. The amount of the July 1977 Social Security cost of living increase is not to be disregarded in determining income for eligibility purposes on institutional cases. (Further instructions pertaining to this disregard in non-institutiional cases will be issued shortly.)

In determination of monthly income for purposes of comparison with the $503 or cost of care limitation in the case of an individual without dependents outside the institution, total monthly income exclusive of any disregards is to be compared with the limitation. If there is a spouse and/or dependent children living in a home outside the institution certain exclusions are applicable. An exclusion of $177.80 (after a disregard of $20.00 of earned or unearned income) for the spouse plus $88.90 per dependent child in the home will apply.

In addition, if the ineligible spouse and/or dependent children have established medical needs the monthly amount of this medical need may be excluded. If the spouse and/or dependents have earned income an exclusion of $65.00 per month is applicable. These exclusions are applied to total family income and any balance remaining is considered available for purposes of comparison with the financial eligibility limitation of $503.00.

Note that these amounts will be applicable on and after July 1, 1977. The old amounts set forth in Employees' Manual, XII-1-12 (Part Two) should be utilized in computing income for eligibility purposes for any retroactive period before July 1, 1977 in the case of applications currently being processed. Note also that subsequent to July 1, 1977, the earned income exclusion will be limited to $65 per month. One-half of the balance

of earned income will no longer be excluded subsequent to that date. This is also applicable to computation of client participation (See Section III).

C. Procedures For Correction of Title XIX Medical Institution Eligibility on Active Cases

Prior to July 1, 1977, the local office shall:

1. Review all cases in medical institutions having income and recompute gross monthly income according to the above instructions.
2. Compute the Social Security cost of living increase as instructed later in this letter.
3. Any case with gross income in excess of $503 shall be terminated in accordance with the timely and adequate notice procedure, i.e., prepare and issue the Notice of Decision, PA-3102-0.
4. Prepare Form 278LM. The termination must be in the case data system prior to

4:30 p.m., June 24, 1977 for the cancellation to be effective July 1, 1977.

D. New Approvals Effective July 1, 1977

All new approvals processed during June 1977, shall be based on the above eligibility guidelines. Eligibility for July 1977 Title XIX payments shall be determined on the increased Social Security benefit as per computation instructions below. The income eligibility for three months eligibility prior to July 1 shall be based on the old Social Security rate and old exclusions.

EXHIBIT B

HOUSE FILE 464

AN ACT

RELATING TO THE ADMINISTRATION AND FINANCING OF CURRENT PROGRAMS UNDER THE JURISDICTION OF THE DEPARTMENT OF SOCIAL SERVICES AND TO FUNDING OF CAPITAL IMPROVEMENT PROJECTS INCLUDING CAPITAL IMPROVEMENT PROJECTS RECOMMENDED BY THE ADVISORY COMMISSION ON CORRECTIONS RELIEF.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:

Section 1. There is appropriated from the general fund of the state for the fiscal year beginning July 1, 1977 and ending June 30, 1978 to the department of social services, the following amounts, or so much thereof as may be necessary, to be used for the purposes designated:

1977-1978

Fiscal Year

1. District Administration

For the administration of district and local offices including salaries and support ..... $ 10,250,000

The provisions of subsection nine (9) of section nineteen A point nine (19A.9) of the Code which restricts employment of intermittent employees to not more than a specified number of calendar days in any twelve-month period without examination, shall not apply during the period beginning on July 1, 1977 and ending June 30, 1978 for forth intermittent employees who are employed in field offices by the department of social services. It is the intent of the general assembly to authorize the continued employment during the 1977-1978 fiscal year of persons employed to assist in meeting the current high demand for income maintenance and related services and to permit the department to avoid the cost of training new employees. Any such employee

of the department of social services who has been employed and classified as an intermittent employee after August 1, 1975 for twelve consecutive months or more shall be eligible to receive the same fringe benefits for fiscal year 1977-1978 as any other person employed under the provisions of chapter nineteen A (19A) of the Code.

2. State Administration

a. For salaries, support, maintenance and miscellaneous purposes ..... $ 4,389,000

Included in this appropriation for state administration is twenty-five thousand (25,000) dollars for one additional prosecutor for the fraud unit.

3. Medicaid Management Information System (MMIS)

For development and implementation of medicaid management information system.....$ 140,000

Sec. 2. There is appropriated from the general fund of the state for the fiscal year beginning July 1, 1977 and ending June 30, 1978 to the department of social services, the following amounts, or so

much thereof as may be necessary, to be used for the purposes designated:

1977-1978

Fiscal Year

FAMILY AND CHILDREN SERVICES:

For the operation of the following institutions:

1. State juvenile home at Toledo ..... $ 1,275,000
2. Boys' training school at Eldora ..... $ 3,100,000
3. Girls' training school at Mitchellville..... $ 1,000,000
4. Iowa veteran's home at Marshalltown..... $ 7,520,000
5. Juvenile community based

3. It is the intent of the general assembly to fully fund the addition to the aid of families with dependent children program as it applies to dependent children through the age of twenty years. If funds appropriated by this Act are insufficient to carry out this intent, it is the intent of the general assembly that a supplemental appropriation will be made by the general assembly meeting in the year 1978 to fund the program as intended.

Sec. 14. The department of social services shall incourage voluntary participation of families in paying for a portion of the care delivered to a relative/resident in an intermediate care facility. Facility administrators and appropriate department personnel, both state and county, will be advised as to the proper method of implementing family participation.

Sec. 15. It is the intent that the department of social services shall increase the maximum reimbursement for intermediate care facility

services under medicaid from nineteen dollars to nineteen dollars and fifty cents and that the department shall increase the fee paid to pharmacists under medicaid from two dollars and fifteen cents to two dollars and fifty-five cents.

Sec. 16. It is the intent of the general assembly that the department of social services, by July 1, 1977, shall review every state staffing requirement contained in the conditions of participation for intermediate care facilities participating in the medicaid program that exceeds federal government requirements and that any such conditions of participation be submitted to the administrative rules review committee.

Sec. 17. The department of health shall delay implementation of the department of health licensure rules for intermediate care facilities as published in the Iowa Administrative Code "Health (470) chapter 58". The department, upon consultation with the health facilities advisory committee, shall review these rules which exceed the federal

Title XIX guidelines for intermediate care facilities. All such modified rules approved by the department of health shall be resubmitted to the administrative rules review committee. The department of health may promulgate rules in areas not addressed by federal regulations.

Sec. 18. It is the intent that the department of social services shall resist the implementation of the federal government spouse income regulation which would allow spouse income under certain circumstances to be excluded from the determination of income for intermediate care facility medicaid eligibility purposes.

Sec. 19. It is the intent of the general assembly that funds appropriated for medical assistance shall not be used to pay for radiology services provided by a computerized axial tomographic scanner placed in operation in the state of Iowa subsequent to the effective date of this Act unless said computerized axial tomographic scanner has been approved by

the health facilities construction review committee of the state department of health.

Sec. 20. Section two hundred twenty-two point eighty-six (222.86), Code 1977, is amended to read as follows:

222.26 PAYMENT FOR CARE FROM FUND. Whenever the amount in the account of any patient in the patients' personal deposit fund exceeds the sum of two hundred dollars, the business manager of the hospital-school or special unit may apply any amount of the excess to reimburse the county of legal settlement for liability incurred by such county for the payment of care, support, and maintenance of the patient when billed therefor by the county of legal settlement. Money-earned-by-a-patient-for-work-performed-in-or-by-a-hospital-school-or-special-unit-shall-not-be-subject-to-this-section-or-to-attachment.

Sec. 21.

1. The department of social services shall implement a pilot program in community services

EXHIBIT C

STATE OF IOWA

DEPARTMENT OF SOCIAL SERVICES

Lucas State Office Building
Des Moines, Iowa 50319

Robert D. Ray
Governor
Kevin J. Burns
Commissioner

June 15, 1977

Mr. Robert Davis
Regional Commissioner
Social and Rehabilitation Services
Medical Services Administration
Dept. of Health, Education and Welfare
601 East 12th Street, Room 564
Kansas City, Missouri 64106

Dear Mr. Davis:

The purpose of this letter is to inform you that the State of Iowa does not anticipate the submittal of amendments to the state plan pursuant to Action Transcmittals SRA-AT-77-4 and 77-6 as specifically related to Federal Regulations 45 CFR 248.3 and 248.21.

We have determined that the revised regulations, which require that the rules for considering income

and resources of a spouse or parent available to an applicant or recipient of Medicaid assistance will be the same as those applied under SSI, are not in the best interest of the state or its citizens. More specifically:

- The General Assembly of the State of Iowa has formally expressed its intent that the state not implement the subject regulations with respect to the deeming of spouses income.
- Conformance to the regulations will serve to increase expenditures and not necessarily result in improved or expanded care for those individuals receiving services under the Medicaid program who can be classified as the most needy.
- The regulation further compounds the complexity of an eligibility process which is already burdensome and once again unilaterally passes costs on to the state without adequately assessing the impact of such action upon individual state programs.

- The proposed regulation did not contain the inflationary impact statement required by OMB Circular A-107. We estimate the change requirements will cost an additional $5,300,000 per year. Given our current budget limits this is an amount which cannot readily be assured without adverse program effects.
- The state has not been able to develop an effective and equitable method of redetermining eligibility for individuals receiving Medicaid services where currently a spouse's income is being deemed while maintaining our present quality of eligibility determination.
- The regulation is in conflict with Chapter 252, Iowa Code and in our view exceeds the authority provided by the Social Security Act for such regulatory action.
- If the Department of Health, Education and Welfare prevails in the imposition of this regulation, the state may have to revise the state plan and revert to a program which does

not accept all SSI eligibles for Medicaid Services thereby reducing the number of persons eligible for medical assistance and in turn prompt the termination of our contract with the Social Security Administration for determining eligibility for SSI recipients of medical services, actions we do not voluntarily wish to take.

In closing, it is paradoxical that HEW would choose to inflate, by regulatory action, the cost and complexity of medical programs at a time the president is calling for welfare reform and limitations on hospital charges.

The state is committed to provide assistance to its needy citizens consistant with utilizing all resources available. To this end, we pledge our continued cooperation.

Very truly yours,

/s/

Kevin J. Burns
Commissioner

KJB/PB/ff

cc: Susan Michelson - Governor's Office

Lee Galeotos - Comptroller's Office

George Cosson - Legal

C. Joseph Baker

Harold Templemon

Catherine Williams

Appeals

XIX SRS Correspondence

PB

CB

EXHIBIT D

STATE OF IOWA

Department of Social Services

Des Moines

NOTICE OF DECISION

Medical Assistance or State Supplementary Assistance

Elvina Herweg

327 9th Ave.

Council Bluffs, Iowa
31501

[Because of the poor quality of copying, and hand-writing which is difficult to decipher, it is impossible to reprint this page. Under the section listed "Action Taken," however, the box is checked which reads: "Your assistance has been cancelled effective 6-30-77."]

EXHIBIT E

State of Iowa

Department of Social Services

NOTICE OF APPEAL

Name of Appellant. Elvina Herwig by husband Darrell Herwig

Address. American Nursing Home Des Moines,
Street or R.F.D. Town

Iowa 50300 Polk C.
or City Zip Code County

Program. Skilled Nursing #81 Case No. 372068

To the Council of Social Services:

My complaint is that "See attached memo"

Therefore, I respectfully make application for a review by the Council of Social Services of the State of Iowa for a redress of the grievance herein stated, as provided by Section 241.11, (AB), Section 249.11, (OAA), Section 239.7, (ADC), Section 241A.8, (AD), Code of Iowa; Chapter 223,

Section 5 of the Acts of the 62nd G.A. (MA).

6-7-77
..... (Date)

..... (Signature of Appellant or Guardian*)

Note: If due to incapacity the appellant is unable to enter his signature, the signature of the person acting for him shall be entered on this line. However, if the appellant has filed his appeal orally or by submitting a signed letter, no signature be entered.

PA 31380 (Revised March 4, 1969)

cc: 4

State of Iowa

Department of Social Services

---

INTEROFFICE MEMORANDUM

Pottawattamie County
Department of Social Services
231 Pearl Street
Council Bluffs, Iowa 51501

June 7, 1977

To: Appeals Office
Department of Social Services

From: Jeanne Hatfield, IMW-I (JH)
Pottawattamie County Department of Social Services

Subject: Oral appeal of Elvina Herwig requested by husband Darrell Herwig
Cancellation of Title XIX

Mr. Herwig contacted me 6-6-77 to discuss attached Notice of Decision received from Becky Atess IMW-I, Polk County. Notice of Decision stated that Elvina's Title XIX would be cancelled effective 6-30-77 due to manual letter XII-1-28 (part two) new State Policy, Client Participation.

Mr. Herweg orally appealed this eligibility determination by Polk County. He stated, "I am

unable to pay for my wifes care in the Nursing Home." He further stated that considering his gross income rather than his net income was unfair.

Mr. Herwig request that this hearing be held in Pottawattamie County rather than in Polk County.

JH/lp

Enclosures

(ND-6/2 - cancelled eff 6/30 - over income appealed 6/6 -

Polk -C (Becky Atess) - will leave same;

784-6544 Notify her of hearing)

RECEIVED
JUN 10 1977

Appeals and Fair Hearing

EXHIBIT F

State of Iowa

Department of Social Services

Des Moines

NOTICE OF DECISION

Medical Assistance or State Supplementary Assistance

Elvina Herweg
327 9th Ave.
Council Bluffs,
Iowa 51501

County Polk Date 7-21-77

Case No. 372068-00-0

Program ECF

Action: ☐ Approval ☐ Review
☐ Denial ☐ Redetermination
☐ Transfer ☒ Cancellation

Name of Facility Americana

---

Action Taken

1. ☐ Your application has been approved effective _____. Medical benefits are effective _____. Your personal allowance is $_____ and you are requied to contribut $_____ per month toward the cost of your care, beginning _____.

2. ☐ Your application has been denied.

3. ☐ As a result of your transfer from one facility to another you will be required to pay $_____ for the first month and $_____ per month thereafter.

4. ☐ A review of your circumstances indicates that you continue to be eligible for assistance.

5. ☐ Your assistance has been cancelled effective _____.

6. ☐ You have been approved for Medical Assistance effective _____.

7. ☒ Your Medical Assitance has been cancelled effective 7-21-77.

Comments by Worker: Appeals officer stated that this was a matter of policy and upheld the previous cancellation.

Payment Computation

| Income From: | Amount |
|---|---|
| _____ | $_____ |
| _____ | _____ |
| _____ | _____ |
| _____ | _____ |
| Total..... | _____ |

less:

Diversion of Income for Spouse

and/or Dependent

| | |
|---|---|
| _____ | $_____ |
| _____ | _____ |
| _____ | _____ |
| _____ | _____ |
| Personal Allowance..... | _____ |
| Total..... | _____ |

Total Income $_____
Less Diversions_____

Client
Participation$_____

If you do not agree with the above decision, you may discuss the decision and your situation with the agency staff, obtain an explanation of the action and present information to show that the action is incorrect. You may speak for yourself or be represented by legal counsel or by a friend or other spokesman.

This conference does not in any way diminish your right to a fair hearing described on the back of this page. If your application has been rejected

or your assistance has been cancelled, you have the right to re-apply at any time.

PA 3159-0 (1/77)

Becky Atess 284-6544
Income Maintenance
Worker/Phone Number

## RIGHT OF APPEAL

If you are dissatisfied with any action or failure to act with regard to your application for public assistance or medical assistance; with regard to the assistance you are now receiving, or because such assistance has been cancelled, you have the right to appeal. (A hearing need not be granted, however, when either state or federal law requires automatic grant adjustments.) You may appeal in writing or orally to the local office of the Department of Social Services, or directly to the Department of Social Services, Robert Lucas State Office Building, Des Moines, Iowa 50319.

You may present your appeal at the hearing yourself or have someone else present it for you. If you wish, you may be represented at the hearing by

an attorney. However, there are no provisions whereby the Department can pay the attorney's fee.

If you request an appeal because of a reduction or termination of your grant within ten calendar days from this notice, assistance will be continued at the present level at least until the time of the hearing. However, such assistance may be subject to recovery if the action is sustained.

The Civil Rights Act of 1964 prohibits any discrimination on the ground of race, color, or national origin in the administration of the public welfare programs. The Act also prohibits discrimination by vendors supplying goods and/or services to recipients for which payment is made directly or indirectly from public assistance funds. Any person who feels he may have been the object of such discrimination may file a complaint with the local office of the Department of Social Services, the State Department of Social Services, or the Federal Department of Health, Education and Welfare.

EXHIBIT G

STATE OF IOWA

DEPARTMENT OF SOCIAL SERVICES

Lucas State Office Building Des Moines, Iowa 50319

Robert D. Ray
Governor

Kevin J. Burns
Commissioner

August 11, 1977

Darrell Herwig for Elvina Herwig
Appeal #81
Polk County

PROPOSED DECISION

This is a PROPOSED DECISION. it will be come a FINAL DECISION in ten (10) calendar days from the above date unless:

1. You object in writing to the Iowa Department of Social Services Commissioner Kevin J. Burns and ask for a review within ten (10) calendar days

or

2. The Commissioner, upon the advice of the

Appeals Advisory Committee, decides to review this PROPOSED DECISION, within ten (10) calendar days.

If you or the Commissioner asks to review this decision, you will be given an opportunity to submit further information in writing; you may also request an opportunity to appear in person.

If this PROPOSED DECISION is not reviewed, you will receive a notice when the decision becomes final. If the decision is reviewed, you will receive the FINAL DECISION.

If your assistance is continuing because of your appeal, it will continue until there is a FINAL DECISION

If you do not understand the above process, please contact your local worker for assistance.

A copy of this PROPOSED DECISION will be sent to all concerned parties.

cc: Robert L. Bray, Atty. 609 Ervin Bldg., Council Bluffs, IA 51501

Office of Appeals and Fair Hearings

IOWA DEPARTMENT OF SOCIAL SERVICES

Lucas State Office Building
Des Moines, Iowa 50319

In Re: Darrell Herwig for Elvina Herwig
Polk County

Case No. 372068

Appeal No. 81

Dear Commissioner Burns:

A hearing has been held in the above named case, and I recommend to you the following resolution of this appeal.

PROPOSED DECISION

Findings of Fact

Darrell Herwig appealed the cancellation of Title XIX medical assistance for his wife, Elving Herwig, due to excess income. A notice of Decision dated June 2, 1977, was sent by the Polk County Department of Social Services which stated that Mrs. Herwig's Title XIX Skilled Nursing Care would be cancelled effective June 30, 1977. That Notice of Decision stated as follows:

Due to Manual Letter XII-1-28 (Part Two), no longer able to allow $85 and ⅓ disregard on earned income--only $65 is allowable. This results in your income being above $503 maximum after allowable diversions.

Mrs. Herwig suffered two cerebral hemorages in August, 1977, which left her in a comatose condition. She was determined to be permanently and totally disabled at that time. The Herwig family lives in Council Bluffs, Iowa. An application was made on October 7, 1976, by Mr. Herwig for his wife's hospital care. When Mrs. Herwig could be released from the hospital, it was discovered that there was no skilled nursing facility available in Council Bluffs, and Mrs. Herwig was placed in Des Moines at Americana on November 1, 1976. At the time of Mrs. Herwig's placement in the skilled nursing facility, the Herwig family consisted of Mr. Herwig, Mrs. Herwig, and their four children. Mr. Herwig is employed as a meat cutter with Hinky Dinky. The client participation for Mrs. Herwig's care at the nursing facility has been calculated as follows:

Her client participation for December was based on earnings of $1,256.00
Diversions of 1,133.30
Client Participation 122.70

Diversions were as follows:

| | |
|---|---|
| ($1,256.00 - $65.00 ÷ 2 = | $ 595.50 |
| Earned income | 65.00 |
| Spouse ($167.00 + $20.00) | 187.80 |
| Children ($65.00 x 4) | 260.00 |
| Personal needs | 25.00 |
| | $1,133.30 |

| | |
|---|---|
| January - March 1977 | |
| Gross Earnings: | $1,256.00 |
| Diversions: | 1,068.30 |
| Client participation: | $ 187.70 |

Diversions decreased due to one daughter now receiving ADC assistance for her baby:

| | |
|---|---|
| April - June | |
| Actual Gross Wages | |
| $314.00 x 4.3 = | $1,350.00 |
| Diversions | 1,115.40 |
| Client participation | $ 234.80 |

Manual Letter XII-1-28 (Part Two) June 3, 1977.

Upon receipt of Manual Letter, client participation was refigured according to letter.

Actual Gross Wages
$5,281.09 ÷ 17 = $310.65
$310.65 x 4.3 = $1,335.80

| | |
|---|---|
| Diversion for earned income | $ 65.00 |
| Diversion for spouse ($177.80 ÷ 20 | 197.80 |
| Diversion for 3 dependents at 88.90 x 3 | $ 266.70 |
| personal allowance | 25.00 |
| | $ 554.50 |

This figure is above $503 maximum and resulted in cancellation.

| | |
|---|---|
| | $1,335.80 |
| | 554.50 |
| | $ 781.30 |

The monthly expenses for the Herwig family are as follows:

| | |
|---|---|
| Client participation | $ 234.80 |
| Groceries (per month) | 250.00 |
| House payment (per month) | 125.00 |
| Real estate taxes | 25.00 |
| Gasoline | 28.00 |
| Electricity | 37.50 |
| Gas | 91.00 |
| Water | 21.00 |
| Payments on loan | 75.00 |
| TOTAL | $ 887.55 |

Mrs. Herwig is in need of skilled nursing care 24 hours per day. At the time of the hearing, she was in a semi-conscious state, and unable to do anything for herself. According to Americana, the cost of Mrs. Herwig's care is running

approximately $1,374 per month, this does not include drug or doctor bills. It is only room charge and physical therapy. An application has been made on Mrs. Herwig's behalf for Social Security Disability benefits. A notice was received on June 29, 1977, that Mrs. Herwig would get $25 per month from SSI (Supplemental Security Income).

Because the issue under appeal in this case was one of state law or policy and not one of incorrect grant computation, Mrs. Herwig's Title XIX assistance which had been continued because of her timely appeal, was ordered discontinued, in accordance with 45 CFR 205.10(a)(6)(i)(A).

On July 28, 1977, a temporary restraining order was issued in the United States District Court preventing the Department of Social Services from terminating Mrs. Herwig's Title XIX medical assistance payments pending the outcome of an action filed in that court regarding the Title XIX eligibility.

## Conclusions of Law

Prior to July 1, 1977, an earned income disregard of $65 per month plus one-half of the balance of the monthly earned income was allowed by the Iowa Department of Social Services to be diverted for a spouse in the computation of the amount of client participation for a patient in an ICF (Intermediate Care Facility) or SNF (Skilled Nursing Facility). If this computation were used, Mrs. Herwig would continue to be eligible for Title XIX Medical Assistance. According to Iowa Department of Social Services Manual Letter Number XII-1-28 (Part Two), the earned income exclusion will be limited to $65 per month as of July 1, 1977. One half of the balance of the earned income is no longer excluded.

The instructions in this manual letter appear to be in direct conflict with the Federal laws and regulations governing the Medical Assitance program. 45 Code of Federal Regulations 248.3(b)(2)(iii), which provides as follows:

> For determinations of eligibility and amount of assistance of categorically needy aged, blind and disabled individuals, States shall apply the budgeting methodology and applicable dollar amounts set forth in title XVI (SSI) of the Act and 20 CFR Part 416 (with applicable variations to take account of any State Supplementary Payment Program which is federally administered or approved pursuant to 45 CFR 248.2(d) or (e).

Both the SSI law, 42 United States Code 1382a(b)(4)(B) and the Federal Regulations, 20 Code of Federal Regulations Part 416, require that the first $65 per month of earned income plus one-half the remainder of earned income is to be excluded in determining the amount of assistance and eligibility.

It should also be noted that the Federal Regulations governing the Medical Assitance Program, 45 Code of Federal Regulations 248.3(b)(2), appear to

conflict with the Iowa Department of Social Services policies concerning the availability of a spouse's income for Title XIX eligibility and amount of assistance. According to the Federal Regulations, the income and resources of a spouse are to be considered as available to the medical assitance recipient only in the amount which is actually contributed, after the month during which they cease to live together. However, the Iowa Department of Social Services received specific instructions from the State Legislature in the House File 464, Section 18, the appropriation bill for fiscal year 1977-78, to resist implementation of these Federal Regulations. Therefore, this departmental policy has not been changed.

It is recommended that the computation of Mr. Herwig's client participation for the care of his wife be REVERSED, and that the Polk County Department of Social Services be instructed to recompute the amount of his client participation,

disregarding the first $65 of Mr. Herwig's earned income and also disregarding one-half of the remainder of that earned income.

Signed this (11th) day of August, 1977

/s/
(Ms.) Artis Reis,
Hearing Officer

kr

cc: Robert L. Bray, Atty., 609 Ervin Building, Council Bluffs, IA 51501.

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF IOWA

CENTRAL DIVISION

FILED

OCT 7 1977

Clerk, U. S. District Court, Southern District of Iowa

| | |
|---|---|
| ELVINA M. HERWIG, et al., Plaintiffs, | ) |
| vs. | ) CIVIL NO. 77-222-1 |
| ROBERT D. RAY, et al., Defendants. | ) STIPULATION |

The parties hereto agree and stipulate that the undisputed facts are:

1. Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, of Plaintiff's complaint are admitted.
2. Paragraphs 10, 11, 25, 26, 27, 28, 29, 30 are denied by the Defendants.
3. Social Services Manual Letter No. XII-1-28 (Part Two) dated June 3, 1977 attached Plaintiff's amended complaint was in effect at all times relevant.

4. All exhibits attached to Plaintiff's amended complaint are deemed admitted into evidence.

5. The plaintiff may submit an affidavit setting forth his current income and expenses.

6. Defendants maintain that their actions are justified because they are consistent 42 USC 1396a (a)(17).

7. The following briefing schedule is established for the submission of statutory claims.

(a) (a) Both parties shall submit their briefs and arguments by no later than Friday, October 21.

(b) Both parties shall have one week from the filing of briefs to file any replies which they desire.

Dated this (7) day of October, 1977.

/s/
ROBERT L. BRAY
Deputy Director

/s/
STEPHEN C. ROBINSON
Special Assistant Attorney General, Sixth Floor, Lucas Building, Des Moines, Iowa 50319

77

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF IOWA

CENTRAL DIVISION

FILED

OCT 25 1977

Clerk, U. S. District Court, Southern District of Iowa

ELVINA M. HERWEG, by her husband and next friend, DARRELL E. HERWEG, and DARRELL E. HERWEG and all others similarly situated,

Plaintiffs,

vs.

ROBERT D. RAY, et al,

Defendants.

Civil No. 77-222-1

AFFIDAVIT

State of Iowa )
) ss
Pottawattamie County)

DARRELL E. HERWEG, the petitioner herein, being first duly sworn, respectfully states to the court that:

1. On September 1, 1977, he was required to go on sick leave status and was subsequently operated on for cancer of the throat. During the sick leave period, the weekly income of $160 is paid by insurance carried with the

Amalgamated Meatcutters Union 271. The sick leave period is for an indefinite period but could be for as long as one year.

2. The personal expenses of petitioner have been:

| | |
|---|---|
| House Payment | $125.00 per month |
| Food | 250.00 per month |
| Clothing | 20.00 per month |
| Transportation | 50.00 per month |
| Medical | 20.00 per month |
| Electricity | 34.00 per month |
| Water | 22.00 per month |
| Gas | 91.00 per month |
| Telephone | 10.00 per month |
| Real Estate Taxes | 32.00 per month |
| Insurance | 28.00 per month |
| Sears | 18.00 per month |
| Penneys | 29.50 per month |
| Bank Loan | 75.00 per month |

3. The petitioner will no longer have sufficient income to pay all monthly payments and if required to pay on his wife's bills, would be unable to do so.

_____/s/

Subscribed and sworn to before me this (20) day of October, 1977.

Linda Rae Minard /s/
Notary Public

JUDGMENT ON DECISION BY THE COURT

CIV 32 (7-63)

UNITED STATES DISTRICT COURT

FOR THE

SOUTHERN DISTRICT OF IOWA--CENTRAL DIVISION

Civil Action File No. 77-222-1

ELVINA M. HERWEG, by her husband and next friend, DARRELL E. HERWEG; and DARRELL E. HERWEG; and all other similarly situated

vs.

ROBERT D. RAY, individually and in his capacity as Governor of the State of Iowa and KEVIN J. BURNS, individually and in his capacity as Commissioner of the Iowa Department of Social Services

JUDGMENT IN ACCORDANCE WITH THE MEMORANDUM OPINION AND ORDER OF JAN. 19, 1978

This action came on for ~~trial~~ (hearing) before the Court, Honorable William C. Stuart, United States District Judge, presiding, and the issues having been duly ~~tried~~ (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that plaintiffs' request for class action certification is granted;

It is Further Ordered and Adjudged that plaintiffs' request for final determination has been treated by the Court as a motion for Summary Judgment and same is granted;

It is Further Ordered and Adjudged that plaintiffs' request for a permanent injunction against state "deeming" procedures is granted;

It is Further Ordered and Adjudged that any other matters not disposed of in the Opinion and Order will be considered upon application of a party or parties;

It is Further Ordered and Adjudged that costs of this action are assessed against the defendants as of costs accrued of this date.

FILED
FEB 2, 1978

Clerk, U. S. District Court
Southern District of Iowa

Dated at Des Moines, Iowa, this 2nd day of February 2, 1978.

James R. Rosenbaum /s/
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 78-1664 September Term, 1978

| | | |
|---|---|---|
| Elvina M. Herweg, etc., et al, | ) | |
| | ) | |
| Appellants, | ) | Appeal from the |
| | ) | United States |
| vs. | ) | District Court |
| | ) | for the Southern |
| Robert D. Ray, etc., et al, | ) | District of Iowa. |
| | ) | |
| Appellees. | ) | |

The present submission of this appeal to a panel of Judges of the Court on January 12, 1979 is vacated and set aside. On its own motion the Court concludes to re-submit this case to the Court en banc.

The Clerk of this Court is directed to calendar this case for oral argument and submission to the Court en banc on Monday, September 10, 1979.

August 10, 1979

JUDGMENT

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 78-1664 September Term, 1979

Elvina M. Herweg, by her husband and next friend, Darrell E. Herweg, and Darrell E. Herweg, and all others similarly situated,

Appellants,

vs.

Robert D. Ray, individually and in his capacity as Governor of the State of Iowa, and Kevin J. Burns, individually and in his capacity as Commissioner of the Iowa Department of Social Services,

Appellees.

FILED
MAY 5 1980
Clerk, U.S. District Court Southern District of Iowa

Appeal From the United States District Court for the Southern District of Iowa

THIS CAUSE came on to be heard on the record from the United States District Court for the Southern District of Iowa and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed except that portion relating to the sources of income the state may consider as available to Medicaid applicants and recipients, which is reversed and remanded.

March 18, 1980

A true copy.

Attest: (Robert D. St Vrain /s/

Clerk, U.S. Court of Appeals, Eighth Circuit

May 2, 1980